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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 393

EDGAR C. JOHNSTON,
Petitioner,

vs.

ARROW PETROLEUM CO., A CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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TABLE OF CASES CITED.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAY IT PLEASE THE COURT:

The petitioner respectfully shows to this Honorable Court:

Summary Statement of the Matter Involved.

This action was brought by Arrow Petroleum Co., an Illinois corporation, against Edgar C. Johnston, a citizen of Texas, to recover damages for an alleged breach of contract under which Johnston agreed to deliver fuel oil to the Arrow Petroleum Co. at Lockport, Illinois, by barge from Vicksburg, Mississippi. The District Court entered a judgment against Johnston in the amount of

$39,345.98 (R. 180-181). An appeal was taken to the Circuit Court of Appeals for the Seventh Circuit where the judgment was affirmed. The petitioner, Johnston, seeks a writ of certiorari from this Court to review the judgment of the Circuit Court of Appeals.

Arrow Petroleum Co. and Johnston had entered into a contract whereby Johnston agreed to deliver to the company a certain quantity of fuel oil over a certain period of time. Johnston was to provide necessary barges and tow boats and was to transport the oil from Vicksburg, Mississippi, to Lockport, Illinois, where Arrow Petroleum Co. was to pick up the barges and tow them to its terminal in Chicago and unload the oil. Arrow Petroleum Co. was to pay (a) 85 cents a barrel f.o.b. Vicksburg, subject to certain market price fluctuations which did not occur, (b) transportation charges of 4½ cents per hundred miles per barrel from Vicksburg to Lockport, Illinois, (c) the cost of towing the barges from Lockport to Chicago, and (d) demurrage, if any, accruing in the event Arrow Petroleum Co., in unloading the barges, exceeded the free unloading time allowed by the contract (R. 7).

After a certain quantity of oil had been delivered, Johnston cancelled the contract. Subsequently, Arrow Petroleum Co. brought this action for breach of the contract. Johnston, in his answer (second defense) to the complaint, defended on the ground that his cancellation was justified, alleging that although demurrage charges in the amount of $4,433.66 had accumulated on several shipments under the contract, Arrow Petroleum Co., upon demand therefor, had refused to pay the amount due under the contract, or any part thereof and refused to recognize any obligation to pay any demurrage whatsoever under the contract (R. 19, 20, 21, 45, 46). The sub-

stance of the answer (averments of the second defense, upon which this petition is predicated) is that Arrow Petroleum Co. wilfully and arbitrarily repudiated the demurrage provisions of the contract, and that Johnston, therefore, was under no legal obligation to continue making shipments of oil.

Johnston filed a counterclaim with his answer seeking recovery of the demurrage due and other damages (R. 21-26).

Arrow Petroleum Co. moved "to strike" the answer for insufficiency in law (R. 35), and moved "to strike" as much of the counterclaim as sought damages in excess of the demurrage (R. 38). "Alternative" replies to the answer and counterclaim were also filed (R. 33, 37).

The motions "to strike" the answer and a part of the counterclaim for insufficiency in law were sustained (R. 95-96). Upon sustaining the motions, the District Court stated in its order that the only issues remaining to be determined were (a) the amount of damage, if any, which the plaintiff was entitled to recover, and (b) the amount of demurrage, if any, the defendant was entitled to recover (R. 96).

The District Court, in allowing the motion to strike the answer, held that a categorical refusal to pay any demurrage due under the contract did not warrant a cancellation of the contract; this holding precluded the presentation of any evidence in support of this defense (R. 78, 118, 141). The parties, in order to avoid extensive proof and the necessity of bringing in witnesses from distant points on the single issue of damages remaining in the case, stipulated that plaintiff's damages, if any were allowable as a matter of law, were $42,336.58, an amount based on the difference between the cost of oil delivered at Chicago by rail from other points and the

price of oil delivered by barge from Vicksburg under the contract; the parties also stipulated, to avoid the taking of evidence, but without prejudice to the allegations of the pleadings, that the demurrage owing to the defendant was $2,990.32 (R. 178-181).

The District Court, taking into consideration the complaint, the answer (R. 149) and the stipulation, and holding the facts set up in the answer, though admitted to be true, were insufficient in law as a defense, gave judgment for plaintiff in the net amount of $39,345.98 (R. 180-181).

The Circuit Court of Appeals affirmed the judgment on a different theory and found (R. 205, 212) that the failure to pay the demurrage was based upon a disagreement as to the amount due under the contract and was not a wilful repudiation of all demurrage liability as asserted by the defendant in his answer and admitted by the plaintiff in its motion to strike. Therefore, the Court said, the cancellation of the contract by Johnston was not justified.

Jurisdictional Statement.

The statutory provision believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code of the United States, as amended (28 U. S. C., Sec. 347).

The judgment of the Circuit Court of Appeals for the Seventh Circuit sought to be reviewed was entered on June 2, 1947 (R. 215). A petition for rehearing was filed and was denied on July 9, 1947 (R. 245).

Petitioner contends that this Court has jurisdiction to review the judgment of the Circuit Court of Appeals on the ground that the judgment deprived him of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. The Circuit Court of Appeals based its opinion on a

recital of facts which were dehors the record and were contrary to the facts upon which the case was submitted to the District Court. The opinion of the Circuit Court of Appeals rests on a point which Johnston never had an opportunity to meet by the production of evidence.

This objection to the judgment of the Circuit Court of Appeals was raised by Johnston in his petition for rehearing (R. 220-225, 231). The objection could not be sooner raised.

The cases believed to sustain jurisdiction are the following: *Saunders* v. *Shaw et al.*, 244 U. S. 317 (1917); *Helis* v. *Ward, Executrix, et al.*, 308 U. S. 365, 370 (1939); *Le Tulle* v. *Scofield, Collector of Internal Revenue*, 308 U. S. 415, 416 (1940).

Questions Presented.

The question presented by the petition is: Did the Circuit Court of Appeals deprive the petitioner, Johnston, of property without due process of law by affirming the judgment upon the assumed existence of a dispute as to the amount of demurrage due—a fact outside of the record and contrary to the record?

If the Court agrees that the petitioner has been deprived of a hearing by the judgment of the Circuit Court of Appeals and grants a writ of certiorari, petitioner, Johnston, requests the Court to consider the case on the merits and to find that the petitioner in the second defense of his answer, the facts of which stand admitted of record, set up a sufficient defense to the complaint. In the event of such a finding this Court should reverse the judgments of the two lower courts and enter judgment here for the petitioner.

If, however, the Court grants the petition but finds that the District Court did not err in holding Johnston's second defense insufficient in law, petitioner requests this Court to review the rulings of both lower courts with respect to petitioner's third defense and to remand the case to the District Court with directions to permit the filing of the amended third defense which sets forth a compromise and settlement agreement.

Reasons for Allowance of the Writ.

The Circuit Court of Appeals, in proceeding upon a set of facts, not only dehors the record but at variance in a vital particular with the facts disclosed by the record, deprived petitioner of his day in court and so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Prayer for Certiorari.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 9173, *Arrow Petroleum Co., Plaintiff-Appellee* v. *Edgar C. Johnston, Defendant-Appellant,* and that the judgment of the Circuit Court of Appeals for the Seventh Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the

premises as to this Honorble Court may seem meet and just.

EDGAR C. JOHNSTON

.....

By JOSEPH B. FLEMING,

.....

JOSEPH H. PLECK

.....

EDWARD C. CALDWELL,

J. N. SAYE,
Of Counsel.

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ARROW PETROLEUM CO., A CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW.

The opinion in the Circuit Court of Appeals (R. 204) is reported in *Arrow Petroleum Co.* v. *Johnston*, 162 F. (2d) 269.

The District Court, in passing upon the plaintiff's motion to strike the answer for insufficiency in law, originally rendered an opinion holding in part that plaintiff's failure promptly to pay demurrage charges was not a sufficient reason in law for the cancellation of the contract by the defendant (R. 78). The defendant thereupon informed the District Court that the answer alleged

a categorical and deliberate refusal to pay any demurrage charges whatsoever due under the contract, as distinguished from a mere failure to pay demurrage promptly. The District Court then reconsidered the matter (R. 109-111, 118), and after further argument, adhered to the ruling sustaining the motion to strike (R. 141).

II.

JURISDICTION.

The statement disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgments in question has been included in the foregoing petition for a writ of certiorari and is hereby adopted and made a part of this brief.

III.

STATEMENT OF THE CASE.

The District Court treated the plaintiff's motion to strike the defendant's answer (second defense) for insufficiency in law as the equivalent of a demurrer. Allegations of the complaint which were admitted by the answer were accepted as facts. The factual allegations of the answer were taken as true (R. 149). Except for a limited stipulation with respect to the amount of the judgment, no evidence was offered by either party. No findings of fact were made by the trial judge (R. 180) who proceeded as if the plaintiff had moved for a judgment on the pleadings (R. 149).

Admitted facts, essential here, leading up to the defendant's alleged breach of contract are as follows:

On September 6, 1941, the parties mutually released each other from all obligations under a prior contract between them dated May 14, 1941, and entered into a new contract to deliver approximately 187,064 barrels of fuel oil by barge from Vicksburg, Mississippi, to Chicago, Illinois, at the rate of approximately 25,000 barrels a month beginning September 1, 1941 (R. 7, 18). The consideration which plaintiff agreed to pay consisted of the following elements: (a) 85 cents a barrel f.o.b. Vicksburg, (b) transportation charges of 4½ cents per hundred miles per barrel from Vicksburg to Lockport, Illinois, (c) the cost of towing the barges from Lockport to Chicago, and (d) demurrage, if any, accruing in the event plaintiff, in unloading the barges, exceeded the free unloading time allowed by the contract (R. 7).

A number of shipments of oil were made under the contract but plaintiff repeatedly and persistently failed to unload the oil within the free time allowed by the contract, thus becoming liable for a substantial amount of demurrage as an agreed part of the consideration for the defendant's undertaking to deliver the oil. Upon demand by defendant, plaintiff refused to pay the amount due under the contract or any part thereof and categorically refused to recognize any obligation to pay any demurrage whatsoever under the contract (R. 19-21, 45-46). Thereupon defendant canceled the contract and, *after such cancellation*, plaintiff for the first time indicated a willingness to pay some demurrage (R. 19, 45).

It stands admitted of record that at the time of the cancellation plaintiff did not dispute the amount of demurrage due but arbitrarily repudiated its obligation to pay demurrage and took the position that it could take an unlimited time to unload the oil without incurring any charge for delay. It was only after the contract was

canceled that plaintiff raised any question as to the amount of demurrage due (R. 19, 45).

The amount of demurrage claimed in the answer to be due was $4,433.66 (R. 19-20). Since the District Court had sustained plaintiff's motion to strike defendant's answer and had held that the only issues remaining to be determined were the amount of plaintiff's damages and the amount of the demurrage, the parties, to avoid extensive proof, stipulated these amounts. The demurrage owing to the defendant was stipulated to be $2,990.62 (R. 178-181) but it was expressly provided in the stipulation (R. 178) and in the Judgment Order (R. 180) that the stipulation was without prejudice to the allegations of the pleadings.

Thus the disparity between the amount claimed in the answer ($4,433.66) and the amount finally stipulated ($2,990.62) does not affect the admitted fact that at the time of the cancellation plaintiff did not dispute the amount due but categorically refused to pay any demurrage whatsoever; and no inference can be drawn therefrom that the reason for plaintiff's refusal to pay any demurrage at all was a dispute as to its amount.

Since the motion to strike admitted the allegations of the answer and was sustained by the court, defendant did not, of course, introduce any evidence, other than the stipulation, in support of the answer. The trial judge stated that he would not hear evidence on a defense which was stricken (R. 115). The District Court took the issue made by the pleadings and held that a categorical refusal by plaintiff to pay any demurrage whatever did not warrant cancellation by defendant.

The Circuit Court of Appeals, however, did not decide the case on the issue made by the pleadings and presented to the District Court. The upper court found that there

was a dispute as to the amount of the demurrage (R. 205, 212) and held, in effect, that a mere dispute as to the amount due did not warrant a cancellation of the contract. The Circuit Court of Appeals thus decided the case on an issue not made by the pleadings, on which no evidence was or could have been introduced under the ruling striking the defense, and on which defendant was not heard.

The second defense of the answer raises other issues which petitioner believes were erroneously decided by the two lower courts but these issues will not be discussed unless the petition for a writ of certiorari is granted.

If this Court grants the petition for a writ of certiorari and finds that defendant set up a sufficient defense in its answer (second defense), then, defendant believes, this Court should render final judgment for defendant.

If, however, this Court grants the petition but decides that the second defense is insufficient in law, petitioner requests that it then review the rulings of the lower courts denying defendant leave to file his amended third defense and that this Court remand the case to the District Court with directions to that court to permit defendant to file such amended third defense.

The facts relating to the amended third defense and the rulings thereon are as follows:

Plaintiff's motion to strike the answer and counterclaim was pending on briefs from February, 1945 to October 2, 1945 (R. 32, 40-42), when the court in a memorandum opinion sustained it, as shown by a subsequent opinion rendered on December 12, 1945 (R. 78). On November 1, 1945, plaintiff's attorneys moved for a formal order to this effect and moved also that the remaining issues be set for trial (R. 54).

With the court's permission (R. 50) defendant next, on

November 5, 1945, filed an amendment to his answer setting up as a third defense, in the alternative, that if the contract had not been effectually cancelled, then it had been rescinded by mutual consent in a final settlement agreement (R. 51-53). The explanation, set up in the motion (R. 49-50) for the delay in setting up this defense was that defendant had not realized the significance of the facts supporting the defense; that he was a resident of Texas and consulted with his attorneys in Chicago, Illinois, only once before his answer was filed. For several months commencing in December, 1944, defendant had been away from all business because of a severe heart attack. The facts constituting this defense had not come to the attention of defendant's attorneys until the middle of August, 1945, and were not finally confirmed by them until after the middle of September, 1945. The motion also averred that during this time plaintiff's motion to strike defendant's answer was pending and undecided by the court (the court having had the matter under advisement since the end of February, 1945), and therefore defendant's attorneys believed that the most appropriate time to move the court for leave to file this amendment would be after a ruling on the motion then pending and undecided (which ruling was expected momentarily). The trial judge accepted this explanation and did not question the facts stated in the motion (R. 117).

On October 4, 1945, the day after defendant's attorneys received by mail the trial court's opinion (sustaining plaintiff's motion to strike the answer and a portion of the counterclaim), they notified plaintiff's attorneys of the nature of this defense of settlement and compromise, and of defendant's intention to file it; they further notified the trial judge, who was then sitting in Freeport, Illinois, to the same effect (R. 49-50). The facts set up in the mo-

tion to file the third defense were subsequently verified by affidavits (R. 87, 102).

On November 5, 1945, the trial court entered an order (R. 50), giving defendant fourteen days within which to file under oath the amendment to his answer (R. 50). This defendant did on November 15, 1945.

In his third defense (R. 51-53) defendant alleges under oath in substance that even if the contract on which plaintiff's suit is based had not been effectually cancelled and terminated as set forth in the second defense, then it was mutually rescinded by a settlement agreement between the parties made on November 12, 1942, which agreement constituted a final settlement of all of the differences arising between the parties upon the contract herein sued upon. With considerable detail, the third defense sets up a meeting between the parties brought about at the request of plaintiff's officers who informed defendant of their desire to discuss the differences and disputes between them. Five named persons were present. At this meeting, after a discussion of the respective claims, the parties mutually agreed that the contract of September 6, 1941, should be abandoned, abrogated and rescinded, and the parties mutually released each other from all claims thereunder. The third defense avers under oath that the settlement agreement and rescission was supported by sufficient consideration in that defendant released plaintiff from any liability to accept and pay for any further shipments of oil, and from all other liability whatsoever under the contract except as to accrued demurrage. Plaintiff, in turn, released defendant from any liability to make any further shipments of oil and from all liability whatsoever under the contract. Both agreed that neither was to render any further performance under the contract. At the same time the parties made a new agreement under which defendant

promised to deliver to plaintiff's refinery at Centralia, Illinois, by rail, an amount of crude oil equal to the amount of fuel oil, barrel for barrel, which remained undelivered under the contract of September 6, 1941, namely, 110,562 barrels.

Under this new agreement, defendant was to deliver the crude oil at the site of his leases in Texas, Louisiana, and Mississippi, with the understanding that the parties' respective agents were to arrange to ship the oil in tank cars to Centralia in the most economical manner in order to take advantage of the lowest possible freight rates (R. 51-52).

At the time this new agreement was made, the third defense avers under oath, defendant was ready, willing and able to perform it and would have done so. But on the day after the making of this new agreement, plaintiff brought the present suit in apparent repudiation of this new agreement and with the apparent intent of attempting to revive the rescinded contract of September 6, 1941. The third defense avers, however, that inasmuch as this latter contract, upon which plaintiff's suit is based, had been thus mutually rescinded, it could not be revived except by the mutual consent of both parties, and that defendant has never assented to any such revival (R. 52, 53).

Plaintiff moved to strike this new defense on November 27, 1945, assigning specific grounds for the motion (R. 75-77), and the court took this motion under advisement and ordered briefs filed (R. 73, 77).

Subsequently, on December 12, 1945, the trial judge vacated the order of November 5, 1945, allowing the filing of the third defense, holding (R. 78-81 in substance (1) that the amendment was not filed in apt time, (2) that the third defense was inconsistent with the second defense and

counterclaim, (3) that the settlement agreement was void under the Statute of Frauds, and (4) that the settlement agreement was too vague and indefinite to constitute a complete and enforceable contract. The court explained that when he had permitted the filing of the third defense, more than a month before, he had believed that he had no discretion in the matter, but upon further consideration he had concluded that he did have discretion to deny the filing of the third defense and would exercise it by denying defendant the right to file it.

To obviate the criticism that the settlement agreement set up in the third defense was vague and indefinite, defendant, on December 13, 1945, sought leave (R. 83-87) to file an amended third defense instanter for the purpose of supplying the particulars necessary to show the complete settlement agreement. At the same time an affidavit of the defendant was filed explaining why the third defense had not been sooner filed (R. 87-89). The motion for leave to file the amended third defense was denied (R. 90-91, 93).

When these orders of December 12 and 13, 1945, were entered the case had not been set for trial. March 18, 1946, was the date fixed for the trial (R. 81-82, 94).

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in finding facts contrary to the admitted facts of record.

2. The Circuit Court of Appeals erred in finding facts dehors the record.

3. The Circuit Court of Appeals erred in deciding the case on facts not contained in the record and on a theory which had never been tried by the litigants, and thus deprived petitioner of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

4. Both Circuit Court of Appeals and the District Court erred in holding that the obligation to pay demurrage was an independent covenant.

5. The District Court erred in holding that an admittedly wilful and persistent refusal by the plaintiff to pay demurrage due under the contract did not justify its cancellation by the defendant.

6. The Circuit Court of Appeals erred in affirming the judgment of the District Court in view of the facts admitted of record.

7. Both the Circuit Court of Appeals and the District Court erred in holding that the second defense of the answer was insufficient in law, and in not entering judgment for the defendant.

8. The District Court erred in vacating its order permitting the defendant to amend his answer by adding a third defense.

9. The District Court erred and abused its discretion

in denying the defendant leave to file an amended third defense.

10. The Circuit Court of Appeals erred in affirming the rulings of the District Court with respect to the third defense and amended third defense.

11. The Circuit Court of Appeals erred in holding that the settlement and compromise agreement set up in the third defense was without consideration and could not be relied upon as a defense because of the Statute of Frauds.

12. Both the Circuit Court of Appeals and the District Court erred in holding the third defense to be insufficient in law.

V.

ARGUMENT.

Summary of the Argument.

A. The petitioner has been deprived of due process of law by the decision by the Circuit Court of Appeals.

B. The admitted facts of the answer ignored by the Circuit Court of Appeals precluded recovery by the plaintiff.

C. Both lower courts erred in their rulings on the third defense.

A.

The Petitioner Has Been Deprived of Due Process of Law by the Decision by the Circuit Court of Appeals.

The Federal Rules of Civil Procedure do not provide for a motion "to strike" a pleading for insufficiency in law, such as was filed by the plaintiff in this case. The District Court, however, treated the motion as an admission of all facts pleaded in the second defense of the answer and entered judgment on (1) such facts alleged in the complaint as were admitted by the answer, (2) the facts contained in the answer and admitted by the motion to strike. The judgment was entered on the undisputed facts emerging from the "two sets of admissions" (R. 149) as if the motion to strike the second defense were a motion for a judgment on the pleadings.

Defendant's answer contains the following averments regarding plaintiff's failure to pay demurrage:

> "the plaintiff ignored requests for the payment of said demurrage and totally ignored its obligation to

pay such demurrage before defendant's declaration that he considered the contract to be no longer in effect because of the plaintiff's failure to pay demurrage" (R. 19).

"the plaintiff, as a result of its failure and *refusal to recognize any obligation to pay demurrage under said contract*, persisted in undue delay in the unloading or discharging of said oil and consistently failed to unload said oil at the rate of 750 barrels an hour" (R. 20).

"denies that the charges for demurrage made by the defendant were unfounded, and denies that the plaintie protested to this defendant against the bills or invoices for all or a part of the demurrage charges, but avers that the plaintiff refused to pay *any* demurrage charges; denies that the plaintiff advised the defendant of alleged faulty equipment" (R. 21).

"avers that the defendant abandoned said contract, as shown by the complaint, because of plaintiff's failure and refusal to pay *any* demurrage *due* under said contract" (R. 21).

"the plaintiff * * * *categorically refused to pay any demurrage whatsoever due* the defendant until after the said contract as amended was canceled by the defendant, when, for the first time, the plaintiff indicated a willingness to pay some demurrage; that the repeated failure to unload the oil at the rate agreed upon, and the refusal to pay *any* demurrage *due* under the contract showed a deliberate intent on the part of the plaintiff to ignore and repudiate material undertakings to be performed by the plaintiff" (R. 45).

"the failure and refusal of the plaintiff * * * to pay *any* demurrage *due* under the contract were inconsistent with an intention on the part of the plaintiff to be bound by the contract; * * * the said breaches of the plaintiff and the plaintiff's attitude toward its obligations under the contract were unconscionable; * * * its failure to pay demurrage were *intentional breaches* of said contract in each instance, and each and every breach * * * by the plaintiff, constituted a

> *wilful* default, going to the root of the contract" (R. 46), (Italics supplied).

The District Court, in commenting on the answer, said that it charged, in effect, that the plaintiff was just "plain cussed and refused to pay demurrage out of pure devilment and for the purpose of breaking the contract and refusing to pay a dime" (R. 149).

The Circuit Court of Appeals, in reciting the facts, stated that the plaintiff did not pay the demurrage claimed and billed by the defendant

> "because the former asserted that the delays in unloading has been caused by faulty barges furnished by Johnston, and for the further reason that the six hour hook-up time allowed by the contract was to be granted to each barge in a tow, rather than for the tow as a whole, as asserted and claimed by Johnston" (R. 205).

After making this statement the Circuit Court of Appeals quotes from a telegram, set forth in the complaint, (R. 9) which was sent by the plaintiff to the defendant after the defendant had canceled the contract, in which the plaintiff said it had not refused to pay demurrage due under the contract (R. 205-206). The self-serving statements in this telegram were denied by the answer, yet the Circuit Court of Appeals apparently attached some significance to them.

The misconception of the record by the Circuit Court of Appeals is further manifested by its statement that

> "the complaint does disclose the only reason given by Johnston for failing to comply with his agreement, and that is the parties' disagreement as to the amount of demurrage due from Arrow which Johnston, up to the time of judgment, had maintained was $4,433.66, and which upon the enry of the final judgment the parties stipulated to be $2,990.62" (R. 212).

The complaint does not allege that there was a "disagreement" as to the amount due at the time of the cancellation but asserts that the demurrage claim was wholly unfounded (R. 8). The answer, which must be taken as true, shows that any supposed disagreement as to the amount due did not enter into the refusal of the plaintiff to pay the demurrage; it shows a wilful and persistent refusal to pay any demurrage, whether due or not due—a repudiation of all demurrage liability.

The stipulation entered into before the entry of the judgment was made upon the express understanding that no inference affecting the pleadings could be drawn from it (R. 178-179). Defendant's counsel stated several times that the stipulation regarding the amount of demurrage was not to be interpreted as an admission by the defendant that the plaintiff's failure to pay demurrage was based on any dispute as to the amount due (R. 108, 113, 114-115). The trial judge expressed his understanding that the stipulation was not to be construed as such an admission (R. 116, 148, 149, 150). The judgment order recites that the stipulation was "without prejudice" (R. 180). Manifestly, the stipulation does not refute the averment that the plaintiff, before the cancellation of the contract, had wholly renounced its agreement to pay demurrage.

Nowhere in its opinion does the Circuit Court of Appeals refer to the allegation of the answer that the plaintiff "categorically refused to pay any demurrage whatsoever due the defendant" (R. 45); that the failures to pay demurrage "were intentional breaches * * * in each instance" (R. 46).

In summarizing the grounds of the second defense, the Circuit Court of Appeals (R. 213) does not refer to the repudiation of the demurrage provision. If the Circuit Court of Appeals had accepted the averments of the an-

swer, showing an arbitrary repudiation of the demurrage obligation, as facts in the case, it could not have stated that the vital question was "whether the covenant relating to demurrage is a dependent or an independent covenant * * *" (R. 214). The vital question presented by the second defense is whether the nature of plaintiff's *breach* was such as to justify a cessation of further performance by the defendant. Restatement, Contracts (1932) § 275, p. 402.

A sales contract, as we shall show, and as we argued in the lower courts (R. 129), may be severable, divisible or apportionable as to payments to be made by a buyer, but may not be severable for other purposes, particularly with reference to remedies for its breach. Where there is a single contract, there may be a general dependency between all the promises on one side and a single promise on the other. The Circuit Court of Appeals could not have reached its conclusion without ignoring the admitted fact that the plaintiff's breaches consisted of avowed and deliberate successive defaults in the payment of demurrage. By failing to consider the case on the facts presented, the Circuit Court of Appeals has deprived the defendant of due process of law.

There can be no doubt that the facts shown by the answer must be taken as true. The District Court accepted them as true (R. 149, 126, 129, 180). If plaintiff's motion to strike the answer for insufficiency in law be considered as the equivalent of a motion for judgment on the pleadings, the judgment must be reversed if it is not supported by the undisputed facts appearing in all the pleadings (1 Moore, Federal Practice, p. 651).

This Court has entertained petition for writs of certiorari in other situations such as this. In *Saunders* v. *Shaw et al.*, 244 U. S. 317 (1917) it was held to be a denial of due process of law for a state supreme court to render a decision against a party based upon a proposition of fact

which was ruled to be immaterial at the trial and concerning which the party had no opportunity to present evidence.

In *Le Tulle* v. *Scofield, Collector of Internal Revenue*, 308 U. S. 415, 416 (1940), in which certiorari was issued to the Circuit Court of Appeals for the Fifth Circuit, this Court said (416):

> "We took this case because the petition for certiorari alleged that the Circuit Court of Appeals had based its decision on a point not presented or argued by the litigants, which the petitioner had never had an opportunity to meet by the production of evidence."

In another case arising in the Fifth Circuit, *Helis* v. *Ward, Executrix, et al.*, 308 U. S. 365 (1939), certiorari was granted on the same grounds.

B.

The Admitted Facts of the Answer Ignored by the Circuit Court of Appeals Precluded Recovery by the Plaintiff.

The deliberate and persistent refusal to pay the demurrage charges due under the contract justified cancellation of the contract by the defendant. In *Norrington* v. *Wright et al.*, 115 U. S. 188 (1885), an action in assumpsit, the court said (205):

> "The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action."

In *Ohio Valley Buggy Co.* v. *Anderson Forging Co.*, 168 Ind. 593, 81 N. E. 574 (1907), an action for damages on a sales contract, the court said (577):

"It appears that appellee, before it refused to fill appellant's order, or orders, for more goods, had already performed its obligations under the contract by furnishing or shipping goods to appellant as ordered, but the latter company appears to have repeatedly and successively failed to perform its corresponding duty under the contract by paying for same within the time prescribed or fixed. Certainly under these circumstances appellee would not be required to continue to comply with the contract by furnishing goods to appellant at the risk of the latter's failure thereafter to comply with the conditions or terms of the contract in making payments as required."

In *Eastern Forge Co. of Massachusetts* v. *Corbin et al.*, 182 Mass. 590, 66 N. E. 419 (1903), also a suit for damages against a seller under a sales contract, the court said (420):

"Here was a contract for the sale and delivery of goods for a time covering a whole year. It was a mercantile contract, and in the making of it the insertion of the time of the payments was strongly insisted upon, as an important condition. From the very first the buyer failed to pay; and, notwithstanding the repeated demands of the seller for the money due, this default, by reason either of the inability or unwillingness of the buyer, continued for months, becoming more and more serious as the amount due became greater. Under these circumstances the seller might reasonably conclude that this failure to pay was chronic, and would continue to be so. In such a state of things, it can fairly be said that justice did not require the seller to continue to deliver goods, but that the default of the buyer was so serious, and so far connected with the substance or consideration of the contract, as to justify the seller in refusing to be further bound by it."

In *Agash Refining Corporation* v. *Soya Processing Co.*,

69 Ohio App. 175, 43 N. E. (2d) 311 (1942), a purchaser brought an action against a seller for damages because the seller, after making the first delivery under a contract providing for deliveries by installments, refused to make further shipments. The court refused to disturb a judgment for the seller where it appeared that the buyer failed to accept the first shipment promptly, failed to unload the car so as to make it available to the seller for future deliveries, and failed promptly to make payment. The court, in quoting from an earlier opinion of Justice Cardozo, in a New York case, said (313):

> "If the default is the result of accident or misfortune, if there is a reasonable assurance that it will be promptly repaired, and if immediate payment is not necessary to enable the vendor to proceed with performance, there may be one conclusion. If the breach is willful, if there is no just ground to look for prompt reparation, if the delay has been substantial, or if the needs of the vendor are urgent so that continued performance is imperiled, in these and in other circumstances, there may be another conclusion."

In 3 Williston, Contracts (Revised Ed. 1936) § 872, page 2455, the observation is made that where there has been a default in a divisible contract, the obligation of the injured party to perform an executory portion of the contract depends on the materiality of the breach.

In *Ballance* v. *Vanuxem et al.*, 191 Ill. 319, 61 N. E. 85 (1901), and in *Lake Shore and Michigan Southern Railway Co.* v. *Richards*, 152 Ill. 59, 38 N. E. 773, 778 (1894), it was held that in order to authorize one party to a contract who is not in default to terminate the contract for default of the other party it is not necessary that such default be of a character to defeat the whole purpose of the contract, but it is sufficient if the default would render further

performance a thing different, in substance, from what was contracted for.

The doctrine of substantial performance has no application where there is an intentional, deliberate and wilful departure from the contract. *Cramer* v. *Esswein et al.*, 220 App. Div. 10, 220 N. Y. S. 634 (1927); *Turner* v. *Henning*, 262 Fed. 637, 638 (C. C. A. D. C., 1920); *Le Bel* v. *McCoy*, 314 Mass. 206, 49 N. E. (2d) 888, 889, (1943); *Sipley* v. *Stickney*, 190 Mass. 43, 76 N. E. 226, 227 (1906).

In every contract there is an implied covenant of good faith. *Uproar Co.* v. *National Broadcasting Co. et al.*, 81 F. (2d) 373, 376-377 (C. C. A. 1st, 1936).

A court cannot speculate on the relative importance of provisions in mercantile contracts. *Burrows & Kenyon, Inc.* v. *Warren*, 9 F. (2d) 1, 4 (C. C. A. 1st, 1925).

The modern view is to treat covenants as dependent whenever possible. 12 Am. Jur., Contracts § 298, p. 850. In case of doubt covenants will be construed as dependent rather than independent, 17 C. J. S., Contracts, § 344, p. 799.

It is the defendant's contention that the demurrage was in reality a part of the purchase price, and was not a severable provision of the contract. The defendant agreed to deliver oil to the plaintiff in Chicago in barges furnished by him. The delivery of the oil to the plaintiff was the defendant's sole obligation. The agreed exchange for defendant's agreement to ship the oil consisted of the payment by plaintiff of the following: (a) the price of 85 cents a barrel f.o.b. Vicksburg, (b) transportation charges of 4½ cents per hundred miles per barrel from Vicksburg to Lockport, Illinois (c) the cost of towing the barges from Lockport to Chicago, and (d) the demurrage, if any. The contract contains no pairing of obligations. No definite

or determinable part of the defendant's obligations on the one hand can be set off or juxtaposed against any definite or determinable part of the plaintiff's obligations on the other hand. Therefore, the undertaking to pay demurrage cannot be treated as an independent covenant, as if it were a separable part of the contract, or contained in some other contract. 3 Williston, Contracts (Rev. Ed. 1936) §§ 860, 860A, pp. 2407-2409.

Delays in unloading necessarily increased the defendant's cost of delivery. We do not know the defendant's margin of profit, and the repudiation of the demurrage clause and the refusal to pay any demurrage whatever might have resulted in a net loss to the defendant on the entire contract. The demurrage provision therefore may not be treated as incidental. It is a vital part of the contract, without which the contract would not have been made.

The answer avers that the obligations of the parties were reciprocally dependent; that the contract was entire (R. 44); that the defaults of the plaintiff went to the root of the contract and tended to defeat the object of the parties in making the contract (R. 46). Where there is any doubt as to whether breaches go to the essence of a contract, or whether the covenants are mutually dependent, or whether the contract is entire and not severable, it is proper to put a definite construction on the contract by averment. The pleader must remove the ambiguity by averring a definite meaning or construction of the language. 13 C. J. Contracts, § 830, p. 716; 55 C. J. Sales, § 1113, p. 1123; 17 C. J. S. Contracts, § 535, p. 1159.

C.

Both Lower Courts Erred in Their Rulings on the Third Defense.

In the event this Court grants a writ of certiorari, this point will be argued in a brief on the merits.

Conclusion.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the judgment for the plaintiff.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 393

EDGAR C. JOHNSTON,
Petitioner,

vs.

ARROW PETROLEUM CO., A CORPORATION,
Respondent.

REPLY TO BRIEF OF RESPONDENT.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

IN THE

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REPLY TO BRIEF OF RESPONDENT.

MAY IT PLEASE THE COURT:

Respondent does not question the proposition that the petitioner has been denied due process of law if the Circuit Court of Appeals based its decision on the assumed existence of a fact, contrary to the record, which the petitioner never had an opportunity to meet by the production of evidence.

The petition is predicated upon the ground that the Circuit Court of Appeals, as shown by the opinion, assumed that the default of the respondent in failing to pay demurrage arose out of a dispute or disagreement as to the amount due, contrary to the admitted allegations of the answer that the respondent "categorically refused to pay any demurrage whatsoever due" the respondent (R. 45), and that the defaults in the payment of demurrage were

"intentional breaches of said contract in each instance" (R. 46).

The jurisdictional basis of the petition is not challenged by the respondent. Respondent in its brief merely contends that the petitioner has not presented a case within the authorities cited in the petition; respondent does not dispute these authorities or cite any authorities to the contrary and therefore impliedly admits that if petitioner has made out a case within the application of the authorities cited, this Court may take jurisdiction by granting the writ of certiorari.

In support of its position, the respondent argues, in effect, that the record does show a dispute between the parties as to the amount of the demurrage due and that therefore the decision of the Circuit Court of Appeals was not based upon any assumption of facts not in the record. Respondent admits that as far as the *pleadings* are concerned the fact is that it categorically refused to pay any demurrage whatsoever due the petitioner. In its brief the respondent states (8):

> "The only thing that stands admitted by Arrow's motion testing the sufficiency of the Answer is that Arrow categorically refused to pay any demurrage. Johnston claimed the amount due was $4,433.66. The motion admitted this."

The existence of the dispute, the respondent contends, is to be inferred from the stipulation, which was entered into by the parties to avoid the necessity of taking evidence on the amount of demurrage due. Respondent contends that the mere fact that the answer claimed demurrage in the amount of $4,433.66, whereas the amount agreed upon in the stipulation was only $2,990.62 shows that there must have been a dispute as to the amount of demurrage due and that the validity of the judgment must be tested in the light of this supposed fact.

In its brief respondent states (9):

> "We feel that the correct answer is that the ruling on the answer is to be tested in the light of the admission that $4,433.66 was owing; but that the validity of the judgment must be tested in the light of the figure determined by the *stipulation*." (Italics ours.)

Manifestly, the respondent, in attempting to support the decision of the Circuit Court of Appeals, has fallen into the error which is implicit in the opinion of that Court; respondent is attempting to supply facts outside of the record by drawing unwarranted deductions from a strictly limited stipulation, contrary to the theory and averments of the answer, which stand admitted of record. The stipulation was made upon the express understanding that no inference of a dispute could be drawn from it (R. 108, 113, 114-115, 178-179). The trial judge expressed his understanding that the stipulation was not to be construed as an admission by the petitioner that the respondent's failure to pay demurrage was based on a dispute as to the amount due (R. 116, 148, 149, 150).

The stipulation does not purport to supply proof in support of either party's case. By agreeing, to avoid the taking of evidence, that the respondent owed $2,990.62 instead of $4,433.66 for demurrage, the petitioner did not admit that prior to the cancellation of the contract by him, respondent's refusal was based on a disagreement as to the amount due, rather than upon an unqualified repudiation of the demurrage liability, as set forth in the answer. The stipulation concerning the amount of the demurrage due is totally unrelated to the admitted averment that the respondent, before the cancellation of the contract by the petitioner, has renounced its agreement to pay any demurrage whatsoever.

The respondent urges that there are no "findings" in

the opinion of the Circuit Court of Appeals. It must be conceded, however, that the Circuit Court of Appeals does not refer to the factual allegations of the answer that the respondent "categorically refused to pay any demurrage whatsoever due" the petitioner (R. 45) and that respondent's defaults in paying demurrage due "were intentional breaches" of the contract "in each instance" (R. 46). Authorities cited by the petitioner on the effect of repeated, wilful defaults are ignored. The opinion discloses that the Circuit Court of Appeals, contrary to the facts of record, lays emphasis on a supposed disagreement as to the amount of demurrage due and, like the respondent in its brief, rejects from consideration the petitioner's admitted factual allegations that the successive defaults of the respondent in failing to pay any demurrage whatsoever were intentional and wilful breaches of the contract. The petitioner, therefore, has been denied due process of law.

Respectfully submitted,

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EDGAR C. JOHNSTON,
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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

SUBJECT INDEX.

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT OF THE CASE.

There can be no basis for any dispute of fact in this case, since the judgment below was entered on the pleadings, plus two stipulations of fact.

The petitioner is hereafter referred to as "Johnston" and the respondent "Arrow".

Arrow sued Johnston for his non-fulfillment of a contract entered into between them on September 6, 1941, providing for the sale and delivery by Johnston and purchase by Arrow of 187 odd thousand[1] barrels of fuel oil. The price was 85¢ a barrel plus 1.19 cents per gallon[2]

1. There had been an earlier contract between them for 225,000 barrels; this contract was for the portion remaining undelivered under the earlier contract (R. 3-6).

2. There are 42 gallons to the barrel of fuel oil.

to cover transportation by barge from Vicksburg to Lockport, Illinois, and deliveries were to be approximately 25,000 barrels per month.

The September 6, 1941 contract provided that Arrow was to have six hours hook-up time free, plus one hour to unload each 750 barrels of oil. For time beyond this Arrow was to pay the demurrage stipulated in the contract, except for delays caused by faulty equipment of the barges.

On March 30, 1942 Johnston had delivered only 76 odd thousand barrels. Arrow had paid promptly for this oil and also that under the former contract.[1] However, delays had arisen in unloading, as a consequence of which Johnston had billed Arrow for $4,433.66 for demurrage, $386.33 of which was for deliveries under the previous contract.

In its complaint, Arrow asserted that this claim was wholly unfounded because it was entitled to the hook-up time as to each barge in the tow, and Johnston allowed it only as to the tow as a whole, and because any further delays were caused by faulty equipment (R. 8). Johnston pleaded his interpretation of the hook-up time and denied that any delays were occasioned by faulty equipment (R. 20, 21).

On April 2, 1942 when Johnston had delivered only 76 odd thousand barrels, Arrow was pressing for further deliveries to meet its urgent commitments. Johnston then repudiated the contract because of Arrow's failure to pay demurrage. Arrow replied that it had never refused to pay demurrage justly owing, but Johnston insisted the contract was ended and demanded the $4,433.66.

Arrow sued here for the difference between the contract price and the market price of the oil remaining undelivered.

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1. This amounted to over $100,000.00 under the September 6, 1941, contract and to over $150,000.00 under both contracts.

Johnston moved to dismiss the complaint claiming it lacked legal sufficiency. In this he was unsuccessful. He then answered, attempting to justify his repudiation of the contract upon Arrow's refusal to pay demurrage and counter-claimed not only for the $4,433.66 of demurrage, but also for $25,000.00 special demurrage for Arrow's failure to unload the barges promptly.

He later[1] filed an amendment to this answer. The answer as amended, asserted an oral agreement by Arrow to unload the barges at 750 barrels an hour and to install equipment capable of doing so. It says these oral undertakings were of the essence of the contract, part of the consideration therefor and indivisible from the other undertakings of the written contract, but that Arrow persistently and in deliberate disregard breached them and, moreover, "categorically refused to pay any demurrage whatsoever". It then says that such conduct by Arrow showed a deliberate intent to repudiate material undertakings, showing a wilful default, going to the root of the contract.

Arrow's motions testing the legal sufficiency of the answer and the special damages in the counterclaim were sustained (R. 95, 96), leaving only two questions: the amount due for demurrage, if any, and the damages due Arrow, if any. These figures were resolved by stipulation upon the entry of the judgment order. Arrow had judgment for the difference (R. 180, 181).[2] This was affirmed by the Circuit Court of Appeals.

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1. This was almost two years after the original answer was filed, and after Arrow's brief on the motion testing the legal sufficiency of the original answer was filed (R. 17, 42, 32, 40, 41).

2. The Third Defense, filed more than three years after suit was brought, and after disposition of the motions attacking the answer and counterclaim are ignored here, since Johnston states he is not raising them on his petition. Its lack of merit is clearly covered by the Court of Appeals decision and the decision of the trial Court (R. 78-81).

The Sole Issue Presented Here.

There were three issues before the Circuit Court of Appeals: (a) The trial Court's ruling on the sufficiency of the Complaint; (b) the trial Court's ruling in sustaining the motion testing the legal sufficiency of the Answer as amended and the Counterclaim; and (c) the ruling on the Third Defense.

The only one of these rulings complained of here is that on the legal sufficiency of the answer, as amended. The trial Court held that it was insufficient as a defense, and this was affirmed upon appeal.

The basis of these rulings was that the oral agreements pleaded by Johnston were unavailable to vary or enlarge the provisions of the written contract, that the intent of the parties was to be derived from the terms of the written contract; and that Arrow's failure to pay the demurrage did not justify Johnston in repudiating the written contract, since the covenant to pay demurrage was independent and incidental to its main purpose, and its breach did not result in the defeat of the contract nor render its object unattainable.

Johnston's position here is that the Court of Appeals decided the case on the basis of findings which are at odds with the admitted facts in the record—namely findings that there was a dispute as to the amount of demurrage, when the motion in the nature of a demurrer admitted that Arrow owed $4,433.66 and wilfully and arbitrarily repudiated the demurrage provisions of the contract (Pet. for Cert. 3, 4).

SUMMARY OF THE ARGUMENT.

The fallacy in the contention made here by Johnston is apparently caused by his misapprehension of three things:

(A) The Court of Appeals made no such findings; and its decision was not based upon any assumption of facts not in the record.

(B) There is no admission in the record that Arrow wilfully repudiated all demurrage liability under the contract. Johnston's assumption of such facts arises out of his failure to grasp that the motion testing the legal sufficiency of the answer admitted only the facts well pleaded and not his conclusions of law drawn from Arrow's breach of its alleged oral undertakings.

(C) The Court of Appeals had before it the stipulation that the amount of demurrage actually owing was only $2,990.62 and not the $4,433.66 claimed by Johnston and admitted to be owing by the motion testing the sufficiency of the Answer.

We will discuss these in order.

ARGUMENT.

A.

The Court of Appeals made no findings as asserted by Johnston, except to point out what the pleadings alleged, and the stipulation of the parties on the demurrage claim. Since the case was decided on the pleadings and the two stipulations, it was necessary for the Appeals Court to describe the pleadings and the proceedings on them. To this the first four pages of the opinion are devoted (R. 204, 207).

Out of this description Johnston isolates the digest of the allegations of the complaint (R. 8) describing the dispute on demurrage (R. 205):

> "In the course of oil deliveries from Vicksburg to Chicago, delays occurred in unloading barges by Arrow. Because of these delays, Johnston billed Arrow for a total demurrage of $4,433.66. Of this amount $386.33 was for deliveries made under the previous contract. The remainder was under the demurrage clauses of the contract of September 6. Arrow did not pay the demurrage thus claimed and billed by Johnston, because the former asserted that the delays in unloading had been caused by faulty barges furnished by Johnston, and for the further reason that the six hour hook-up time allowed by the contract was to be granted to each barge in a tow, rather than for the two as a whole, as asserted and claimed by Johnston."

and calls it a finding! His own contrary allegations of his answer are found in the opinion at page 206 of the record.

Again on page 212 Johnston cites:

> "However, the complaint does disclose the only

reason given by Johnston for failing to comply with his agreement, and that is the parties' disagreement as to the amount of demurrage due from Arrow which Johnston, up to the time of the judgment, had maintained was $4,433.66, and which upon the entry of the final judgment the parties stipulated to be $2,990.62."

The language is out of a paragraph which disposes, in part, of the error assigned on the disposition of the *motion to dismiss the complaint!* It is elementary that such a motion admits the facts well pleaded.

The first "finding" Johnston cites is simply the description of those allegations of the Complaint having to do with demurrage; he omits the contrary allegations of his own answer. The second "finding" is simply the statement of the Court setting forth the allegations of the complaint in the light of a motion against it admitting the facts well pleaded.

In disposing of the point on which Johnston bases his petition here, the Circuit Court of Appeals commences on page 214 of the record and concludes on page 215:

> "In the light of the decisions referred to, we think the demurrage clause in this contract was an independent covenant and that it did not go to the consideration for the whole contract. *Palmer* v. *Meriden Britannia Co., supra; Rubens* v. *Hill*, 213 Ill. 523; *Foreman Trust and Savings Bank* v. *Tauber, supra.* We are convinced that Arrow's default in the payment of demurrage did not justify Johnston in cancelling the contract."

There were no "findings". The Circuit Court of Appeals held simply that Arrow's failure to pay the demurrage did not justify Johnston's repudiation of the contract.

(B)

There is no admission in the record that Arrow wilfully and deliberately repudiated its obligation to pay demurrage under the contract. The basis for this assertion lies in Johnston's failure to realize that a demurrer, or motion in the nature of a demurrer, admits only the facts well pleaded.

The oral undertakings on the part of Arrow alleged by Johnston in his Answer to unload at 750 barrels an hour and to install equipment capable of doing so were properly stricken by the trial and Appeals Court. The correctness of such decisions is not questioned by Johnston here. He does not even mention these allegations nor the theory that prompted them.

His conclusions drawn upon them, that Arrow showed a deliberate intent to repudiate material undertakings, showing a wilful default going to the root of the contract likewise fall (R. 45, 46).

It is elementary that such a motion admits only the *facts* well pleaded; neither conclusions, nor facts inadmissible in evidence.

The only thing that stands admitted by Arrow's motion testing the sufficiency of the Answer is that Arrow categorically refused to pay any demurrage. Johnston claimed the amount due was $4,433.66. The motion admitted this.

But the assertions that Arrow "wilfully and arbitrarily" repudiated the demurrage provisions of the contract are pure conclusions on Johnston's part. Witness Arrow's wire of April 2, 1942 (Rec. 9) which stands admitted of record.

(C)

The Circuit Court of Appeals had before it the stipulation of the parties that the demurrage actually owing was only $2,990.62, and not the $4,433.66 claimed by Johnston and admitted by Arrow's motion.

True, in determining the legal sufficiency of the answer, Arrow's motion admitted that $4,433.66 was owing and that Arrow refused to pay this sum.

But when the case came on for trial, to dispose of the issue remaining under the counterclaim, the parties stipulated that Arrow owned only $2,990.62 and not the larger figure.

The appeal brought the whole record before the Court of Appeals, including the judgment appealed from. The stipulation was embodied in the judgment order (R. 180, 181).

Johnston feels that he is entitled to the credit for the demurrage in the amount stipulated, but that for the purpose of justifying his repudiation Arrow must be held to owe the larger figure.

We feel that the correct answer is that the ruling on the answer is to be tested in the light of the admission that $4,433.66 was owing; but that the validity of the judgment must be tested in the light of the figure determined by the stipulation.

If any inference is to be drawn from the stipulation entered into upon the entry of judgment, it is that Arrow did not owe the $4,433.66 claimed by Johnston when he repudiated the contract.

Conclusion.

As this case progressed, Johnston's maneuvers to stay in court grew increasingly desperate. At the pre-trial conference the Trial Court suggested a reply which would, in the alternative, test the sufficiency of the Answer and Counter Claim, and requested briefs on such motions. This was December 21, 1944 (R. 32). After Arrow had filed its motions and its briefs in support thereof (R. 33), Johnston obtained two extensions of time to file his brief and on the second extension, obtained leave to amend his answer (R. 40, 41). This was February 17, 1945, over two years after suit was filed. The Trial Court ruled adversely to Johnston on October 2, 1945 (R. 49, 50, 57, 78). When this happened, Johnston brought in his third defense—three years after suit was filed (R. 50, 59, 61, 62)! After the Trial Court had ruled adversely on the third defense, Johnston moved to amend it (R. 90, 91, 92-94, 87).

All through this litigation he has squirmed first one way and then the other, without reference to any position he had taken previously.

The contentions made in his Petition here are on a par with his previous conduct of the suit.

It is respectfully submitted that his Petition should be denied.

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